

MACO WAREHOUSE CO.

FEBRUARY 28, 1956.—Committed to the Committee of the Whole House and ordered to be printed

Mr. BURDICK, from the Committee on the Judiciary submitted the following

R E P O R T

[To accompany H. Res. 406]

The Committee on the Judiciary to whom was referred the resolution (H. Res. 406) for the relief of Maco Warehouse Co., having considered the same, report favorably thereon without amendment and recommend that the resolution do pass.

This resolution is merely to refer H. R. 7176, a bill for the relief of Maco Warehouse Co., of Stockton, Calif., to the United States Court of Claims for the findings of fact and report its conclusion to the Congress. Your committee is of the opinion that it is a case that should be referred to the court and, therefore, recommend favorable consideration of the resolution.

The bill is as follows:

[H. R. 7176, 84th Cong., 1st sess.]

A BILL For the relief of the Maco Warehouse Company

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury is authorized and directed to pay, out of any money in the Treasury not otherwise appropriated, to the Maco Warehouse Company, Stockton, California, the sum of \$229,750.50. The payment of such sum shall be in full settlement of all claims of the said company against the United States on account of the cancellation by the United States, prior to the expiration date, of the lease contract numbered DA (s) 04-203-eng-211, dated June 23, 1950, and on account of alterations and repairs required to be made to the leased premises in order to obtain certain insurance thereon in compliance with such lease contract, and for which the said company has not been reimbursed: *Provided*, That no part of the amount appropriated in this Act in excess of 10 per centum thereof shall be paid or delivered to or received by any agent or attorney on account of services rendered in connection with this claim, and the same shall be unlawful, any contract to the contrary notwithstanding. Any person violating the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding \$1,000.

DECEMBER 1, 1955.

HON. EMANUEL CELLER,
*Chairman, Committee on the Judiciary,
House of Representatives.*

DEAR MR. CHAIRMAN: Reference is made to your letter enclosing a copy of H. R. 7176, 84th Congress, a bill for the relief of the Maco Warehouse Co., and requesting a report on the merits of the bill.

The Department of the Army is opposed to the above-mentioned bill.

This bill provides as follows:

"That the Secretary of the Treasury is authorized and directed to pay, out of any money in the Treasury not otherwise appropriated, to the Maco Warehouse Company, Stockton, California, the sum of \$229,750.50. The payment of such sum shall be in full settlement of all claims of the said company against the United States on account of the cancellation by the United States, prior to the expiration date, of the lease contract numbered DA (s) 04-203-eng-211, dated June 23, 1950, and on account of alterations and repairs required to be made to the leased premises in order to obtain certain insurance thereon in compliance with such lease contract, and for which the said company has not been reimbursed."

It appears that on May 29, 1950, the Department of the Army invited bids for the leasing of approximately 14.5 acres of Government-owned land and improvements consisting of two buildings and a loading platform at the Stockton Subdepot of Benicia Arsenal. Under the terms of the invitation a lease was offered for the 1-year term of June 20, 1950, to June 19, 1951, subject, however, to revocation at the will of the Secretary of the Army. When the bids were opened it was determined that the high bid was submitted by the three co-venturers, Jack Colberg, William F. Cook, and Edmond J. Mahoney, Jr., who later adopted the trade name of Maco Warehouse Co. A lease, reserving to the United States a rental of \$64,708 per annum, was executed by the successful bidders on June 16, 1950, and on behalf of the Secretary of the Army on June 23, 1950. On November 1, 1950, following a determination of need therefor because of the Korean conflict, notice of revocation of the lease effective immediately was served on the lessees. The lessees were also notified to remove their property within 45 days, which was determined to be a reasonable time, taking into account the use to which the property was devoted by the tenants.

During 1951 claims for damages and losses alleged to have been sustained by reason of the revocation of lease were presented by the lessees to the Department of the Army. The sum of \$4,750.50 was claimed for improvements to the leased buildings and \$225,000 as the loss of anticipated profits and destruction of business. These claims were considered by the Department of the Army and submitted to the General Accounting Office, recommending disallowance. On February 13, 1952, the Comptroller General notified the Maco Warehouse Co. that the claim had been disallowed because, first, the revocation was in accordance with contract terms and that, therefore, the Government is not liable for damages arising from such action; and, secondly, that the alterations and improvements made to the premises were a voluntary act involving no express or implied obligation on the part of the United States to effect reimbursement.

No new or additional facts have been presented since this matter was considered under the administrative claims procedure. The Department of the Army finds no basis in law or equity that would justify making any payment for damage suffered by the lessees because the Department of the Army exercised its right to terminate the lease. It is unfortunate that military necessity dictated revocation of this lease; however, the invitation for bids and the lease expressly provided that the lease could be revoked at the will of the Secretary of the Army.

The lessees assumed a business risk and entered into the lease. In the circumstances, the lessees should not be compensated for anticipated business profits.

This Department is informed that the Department of Justice is considering a request of the Comptroller General to file suit against the claimants for \$2,127.36 in unpaid rentals under the lease.

Enactment of this bill would involve an expenditure of \$229,750.50.

The Bureau of the Budget advises that there is no objection to the submission of this report.

Sincerely yours,

CHARLES C. FINUCANE,
Acting Secretary of the Army.

RÉSUMÉ OF BASIS FOR MACO WAREHOUSE CLAIM AS PRESENTED IN H. R. 7176

Sometime prior to June 1950, the property and improvements known as Stockton Subdepot, Benicia Arsenal, located adjacent to the Port of Stockton, Stockton, Calif., were deactivated and declared excess property by the Army. Most of the improvements, consisting of buildings, were demolished or wrecked and removed, with a few exceptions, including two buildings involved herein, being Building T-962 and Building T-964.

The Army, through the Real Estate Division of the District Engineers, SFD, offered these two buildings, together with 14½ acres, and joint use of railroad trackage and belt lines, for lease on open bids. Jack Colberg, William F. Cook and E. J. Mahony, Jr., as copartners, were the high and successful bidders, on a bid of \$64,708 annually, rentals payable in equal monthly installments.

Following the acceptance of said bid, and on June 20, 1950, a written indenture of lease, drafted and prepared by the Legal Department of the Army Engineers was duly executed. Inserted in said lease, in conformity with the general practice of the Army, was a proviso that it might be terminated "at will" by the Secretary of the Army. Apparently no particular attention or scrutiny was given to this particular clause at the time, it was known, of course, by both parties, that the tenants were to use said buildings for warehouse facilities, with commodities placed therein on an annual basis. There is no doubt whatever that the parties negotiating said lease did so in the utmost good faith, and that it was known that the tenants would require a minimum of 1 year to operate said premises on a successful and/or profitable basis.

Preliminary to their occupancy, it was necessary that the tenants did expend considerable sums of money to make said facilities usable. This is evidenced by a written inventory and condition report, dated June 15, 1950, signed by Guy A. Utter, representing the Post Engineer's Office at Stockton Subdepot of Benicia Arsenal, and K. A. Flesh, representing the San Francisco District Engineer, which inventory, under the code letter "R" stated "used—repairs required, condition 4 poor."

During the course of vacating said premises by Maco Warehouse Co., in December 1950, these improvements and repairs were discussed at the local level with inspectors of the post engineers of Sharpe General Depot, who requested that removable installations remain, for which, at the time, it was agreed the sum of \$4,750.50 would be allowed. This amount was never paid. A claim, filed later therefor, was rejected by the Comptroller's office.

On June 20, 1950, the aforesaid 3 tenants, doing business as Maco Warehouse Co., launched into a vigorous campaign to fill the said 2 warehouses, which totaled an area of 400,000 square feet, with the result that the entire available space was committed for 1 year next ensuing, at the prevailing Interstate Commerce rates, the types and character of said bailees, and space allotted each, being as follows:

	<i>Square feet</i>
California Packing Corp.....	120, 000
Flotill Products Co.....	80, 000
Richmond Chase Co.....	40, 000
American Can Co.....	40, 000

The foregoing space was for case goods, products of the aforesaid canning companies, and totaled 280,000 square feet of space, accounting for all but 120,000 square feet which was committed to the following:

	<i>Square feet</i>
Commodity Credit Corporation, located at San Francisco, Calif.....	100, 000
California Poultry Producers Association, for processed poultry feed....	20, 000
General Electric Co., Oakland, Calif.....	20, 000

It will be observed this was an overcommitment of available space by at least 20,000 square feet. This was occasioned by the fact that the commitment to the Commodity Credit Corporation was originally 80,000 square feet; however, they actually took and occupied 100,000 square feet.

Goods began arriving and were stored in said facilities June 20, 1950, being completely filled by October 1950. Said facilities were filled as fast as equipment and labor could so do. In addition, there were many standby accounts or bailees who had made application for space then unavailable, assuring round-the-clock or 12-month income to full capacity. This favorable situation was accomplished in spite of the confusion and uncertainties existing by unauthorized reports of cancellation as hereinafter related.

The amount of the claim in the bill is \$229,750.50, and represents loss of revenue from the actual commitments, not those anticipated, plus the sum of \$4,750.50 for improvements. The fact that this was income actually earned, and for all practical purposes in the bank, is stressed for the reason that in a letter in re H. R. 7176, a bill for the relief of the Maco Warehouse Co., dated December 1, 1955, addressed to Hon. Emanuel Celler, chairman, Committee on the Judiciary, House of Representatives, by Charles C. Finucane, Acting Secretary of the Army, it is stated on the second page thereof: "The lessees assumed a business risk and entered into the lease. In the circumstances, the lessees should not be compensated for anticipated business profits."

By reason of the facts just related, the claimants take the position that they were actually deprived of the amount specified in H. R. 7176.

CONFUSION IN RE SAID LEASE

Following the execution of said lease and during the operation of said facilities by lessees, and about July 18, 1950, a disquieting article appeared in the local press entitled "Army Holds Sale of Port Depot." Said article purported to quote the local port director as to the status of the lease herein involved, reciting same had a "10-day cancellation clause" and intimating that it would be terminated under that clause.

On August 17, 1950, again in the local press, an article appeared headed "Army Takes Over Subdepot Again." This article quotes Col. D. S. McConaughy, Commanding Officer of Sharpe General Depot to the effect that his department was taking over the said facilities on September 1, 1950, for operation as a storage area. The article further stated goods stored by lessees herein "must be removed." Again, in the same local press, on Wednesday, August 30, 1950, there appeared an article headed "Army Takes Over Site of Subdepot," subtitle reads "No Effect Seen on Current Operations." The gist of this article states that while the Stockton Subdepot would be transferred to the Quartermaster Corps on the following Friday, there would be no change in the status of the Maco Warehouse Co. The article states these facts (there would be no change in status) were made plain today in a statement from Col. D. S. McConaughy, Commanding Officer of Sharpe General Depot, and local Commander of Quartermaster Corps. The colonel is further quoted as stating he, as of that date, had no information as to when the Quartermaster Corps would start using the subdepot property, or how much of it would be used, and further stated that the Maco Warehouse Co. lease was up to the Army Corps of Engineers, which serves as a real-estate agent for the property. The article goes on further to state that the Maco Warehouse Co. was in the process of moving 4 million cases of canned goods and 300,000 sack of beans, and that the payroll of the Maco Warehouse Co. was \$4,000 per week, and, in addition to that loss, the port would suffer by reduced tonnage moving over its docks. The same article quotes one of the lessees and pointed out that there were 200 acres of hardtopped open surface area and some buildings at said subdepot available for storage.

Because of this unfavorable publicity, much confusion and uncertainty was occasioned, particularly as to the bailees, several of whom, together with lessees contacted Colonel McConaughy and the district engineers at San Francisco, the latter assuring all said parties that the lease was in effect and would remain so, and, in fact, suggested an extension thereof for an additional 2 years. This was subsequent to a long-distance telephone call by the district engineer to Washington, and occurred about September 1, 1950. It was not until November 1, 1950, that the official order came from Washington through the district engineer's office, terminating said lease.

We have been unable to determine at what level or by whom the proceedings to cancel said lease were originated.

NECESSITY OF THESE FACILITIES

Upon notification of official order terminating said lease, the lessees cooperated, as did the bailees, and vacated said facilities, during which period there was of course no income, but considerable expense to lessees, and for which period the Government continued to claim rent.

Between November 1 and November 10, 1950, lessees had vacated and surrendered to the Quartermaster Corps approximately 80,000 square feet, or two bays, which, we are advised, were all the facilities required or used by the Quartermaster Corps. Said space just mentioned, we are informed, was used by the

Quartermaster Corps for the storage of obsolete and salvage material they had stored in the Naval Annex at Rough and Ready Island, and which material was, a short while thereafter, disposed of at a surplus sale. With the exception herein noted, said facilities remained unused until February 1955, when said facilities were transferred to the Air Corps for the storage of wing tanks.

The remaining space was delivered to the Government progressively as it was emptied, up to February 1951, when all of said facilities were surrendered and vacated.

The foregoing is related for the purpose of pointing out that, while someone thought there was an urgent necessity for the use of said facilities, a post mortem survey indicates they were mistaken, and this mistake cost the lessees the sum claimed.

The Stockton Chamber of Commerce, based on a Government survey, shows that at the time this lease was canceled, the Sharpe General Depot and the Stockton Annex to the Sharpe General Depot, and the Stockton Naval Supply Annex (this excludes the facilities in question), all in this area, comprised 3,000 acres of Government-owned land, upon which were warehouse facilities grossing 13,618,000 square feet, and 20,863,000 square feet of open storage space, and the facts are that these facilities were sufficient to accommodate the requirements of the Armed Forces during the great and prolonged World War II.

It seems quite evident that the necessity of storage facilities just prior to the Korean episode was a minor affair, comparatively speaking, and could not have involved necessities of warehouse facilities to the extent that the major conflict did.

By reason of the foregoing facts, we are compelled to believe there was little or no consideration given by those responsible for the order of cancellation of said lease, of the injury and damage to the lessees, or the real requirements of the Army as to the need of warehouse facilities. We feel a much greater service would have been rendered to the war effort in storing the type and character of goods then in said facilities than in the type of obsolete supplies that were placed therein after the cancellation, especially in view of the fact only a small portion was thereafter actually used. A substantial portion of the said facilities under Maco Warehouse Co. were then being utilized by a branch of the Government, to wit, the Commodity Credit Corporation, for storage of essential food.

The lessees have diligently presented this claim for damages. A comprehensive written application for redress was filed by the Maco Warehouse Co. which subsequently was given identification No. 20934278. Said claim was addressed to the United States Government, Washington, D. C., attention of General Larkin, G-4, Department of the Army of the United States, and filed with said Department for processing on or about July 1951. Many exhibits were attached thereto, including newspaper articles, etc. Subsequently, upon request, additional data was gathered and filed supporting said claim. The claim was processed and finally came before the General Accounting Office of the United States. It was rejected on the recommendation of the Army on the legal ground that the cancellation clause controlled.

Obviously, the equities of the case were ignored. We concede as a strict matter of law that the Maco Warehouse Co. has no legal claim against the Government, which accounts for the fact that H. R. 7176 has been presented in order that the equities in the case may be considered.

It is our belief that this claim is not one based upon speculative or prospective profits, rather, that it is fixed and certain as to amount and that said moneys were actually earned and due upon definite commitments which would have been collected had not the lease been canceled.

It seems to us that regardless of the good faith of those who caused the cancellation of the said lease, the facts now indicate there was no necessity therefor. We do not believe the Government contemplated an arbitrary cancellation by the "at will" clause, but, on the contrary was dealing in good faith with the tenants and will continue to do so in considering this claim.

We have asked for and hope to receive and file with the committee, a written statement from D. S. McConaughy, Brigadier General, United States Army (Retired), and Commanding Officer of Sharpe General Depot at said time, and a letter from some member of the district engineer's staff at San Francisco that negotiated the lease. These letters, if received, will be written by representatives of the Government at the local level who were directly concerned in the execution and cancellation of this lease. We believe these two sources, who know all the facts by personal inspection and observation, will express an opinion, based on all the facts and circumstances, that Maco Warehouse Co. is equitably entitled to compensation.

In a recent local news article, quoting our local port director, it is suggested that the port district may acquire this same property from the Government for the reason same is nonessential to Army needs. This news release followed the port director's return from Washington, D. C.

In conclusion, we present this merely as a brief résumé, and refer to the more detailed data in the original claim and supplementary documents filed thereunder, being numbered 20934278. A complete copy of the claim and attached exhibits is in the file of Congressman J. Leroy Johnson.

Since dictating and preparing the foregoing, we have received a statement from D. S. McConnaughy, brigadier general (retired), and a letter from the Corps of Engineers, United States Army, Office of the District Engineer, SFD, over the signature of R. U. Downie. He is legal adviser to said Corps of Engineers, and drafted the original lease. His letter was in response to a letter from Maco Warehouse Co. Copies of these documents are hereto attached and marked "exhibits A and B," respectively.

Respectfully submitted,

MACO WAREHOUSE CO.
By E. J. MAHONY, Jr., Partner.

LAWRENCE EDWARDS,
Attorney for Maco Warehouse Co.

EXHIBIT A

To Whom It May Concern:

I, D. S. McConnaughy, Brigadier General, United States Army (retired), was in command of the Sharpe General Depot, Lathrop, Calif., from November 18, 1949, until November 15, 1950.

My first knowledge of any intention of the Army to reoccupy the ordnance subdepot came in a newspaper report about July 18, 1950. At that time I had received no information from Washington in connection with this report.

Subsequently, the Maco Warehouse Co. questioned me as to the possibility that the Army would take over. I advised them that I had received no such information, but suggested that they contact the district engineer, in San Francisco, who had prepared the lease as an agent of the Government.

Late in July 1950, I heard from the Office of the Quartermaster General that acquisition of the Stockton Subdepot was contemplated. I received War Department General Order No. 8, dated August 24, 1950, transferring the Stockton Ordnance Subdepot to the control of the Quartermaster General. General Order No. 5, Headquarters, Sharpe General Depot, dated September 1, 1950, indicated that I assume command of the ordnance subdepot as of that date.

On or about the 25th day of August 1950, the Quartermaster General requested the Department of the Army to initiate action to terminate the lease. A study was requested by the Department of the Army, to make sure that the necessity for such termination actually did exist. An investigation was completed on September 27, 1950, the Quartermaster General advising the Department of the Army that the requirements for the space remained as originally stated; further, that all the space contemplated to meet the storage requirements would be required prior to the expiration of the lease, and, further, that the greater part of the receipts from procurement were scheduled to arrive prior to December 31, 1950. During this period, representatives of the Maco Warehouse Co. inquired numerous times for specific information as to the requirements of the Army, and the possibility of termination of their lease. I advised Maco Warehouse Co. that I had no information concerning the lease, as that was handled entirely by the district engineer, who at that time had received no information from Washington indicating the termination would be effected. It was not until October 16, 1950, that the division engineer of the Southern Pacific Division at Oakland Army Base was requested to terminate the lease with the least possible delay. This was the first official information that the Maco Warehouse Co. had received over a period of 4 months, during which time there was considerable unfavorable publicity in the local press.

During this period of uncertainty, and due to lack of specific official information, representatives of various canneries throughout the area, who had contracts with Maco Warehouse Co., queried me as to the possibility that the lease would be terminated. I was unable to give them any specific information, and advised them that the district engineer was the proper person to provide that information.

On October 26, 1950, a conference was held between the district engineer and Maco Warehouse Co. and Sharpe General Depot, wherein it was indicated that Maco Warehouse Co. would require 90 days for the removal of property stored,

and, further, that it would take until March 31, 1951, to clear 2 of the bays, consisting of 80,000 square feet. It was agreed, however, that evacuation would proceed under a mutual agreement between Sharpe General Depot and the Maco Warehouse Co. On October 27, 1950, I was directed by the Army to vacate the Naval Annex by December 31, 1950. On November 1, 1950, the district engineer officially advised the Maco Warehouse Co. that the lease would be terminated.

Between the 1st and 10th of November 1950, 75,600 square feet of space was evacuated by the Maco Warehouse Co. and taken over by a movement of supplies from the Naval Annex. The nonreceipt of shipping instructions from the Commodity Credit Corporation and various owners of canned goods stored by the Maco Warehouse Co. seriously delayed the movement of these supplies despite the fact that a determined effort was made on the part of the lessee.

I relinquished command on November 15, 1950.

I have made the above statement because I understand a bill (H. R. 7176) has been presented to Congress on behalf of Maco Warehouse Co., introduced by Congressman J. Leroy Johnson. Subsequent to my taking over the ordnance subdepot, I had many occasions to observe the warehouses occupied by the Maco Warehouse Co., and to observe their operation. The Maco Warehouse Co. had made certain changes in the sheds, particularly to the electric circuits in order to be able to operate, since these had been almost completely removed by the Ordnance Department. From my conversation with representatives of various canning companies, I am confident that the operation was materially reduced due to lack of specific information covering the requirements of the Army, and the possible effect that the revocation of the lease might have on their continued operations.

It is my considered opinion that the 4-month delay in the actual termination of the lease materially affected the operations of the Maco Warehouse Co., and I further feel that they have a just claim for recompense for the losses which they undoubtedly suffered.

I certify that the statements above are true to the best of my knowledge and belief.

D. S. McCONNAUGHY,
Brigadier General, United States Army (Retired).

EXHIBIT B

CORPS OF ENGINEERS, UNITED STATES ARMY,
OFFICE OF THE DISTRICT ENGINEER,
SAN FRANCISCO DISTRICT,
San Francisco, Calif., January 13, 1956.

SPNRM 153 (Benicia Arsenal)
(Maco Warehouse Co.)

LAWRENCE EDWARDS, Esq.,
110 NORTH SAN JOAQUIN STREET,
Stockton, Calif.

DEAR MR. EDWARDS: In reply to your letter of January 10, 1956, the following comments are made.

Your statement on the second page that assurance was given about November 1 that the lease was in order is in error. On the 24th of October I informed Mr. Mahoney and Mr. Colberg in their office at Stockton that although we did not have the authentic order to cancel the lease, we had received official information that the lease was to be canceled. Prior to that time no official information was on hand in this office that the lease was to be canceled. On July 28, 1950, Mr. Mahoney was in this Office and was advised that the lease was in order and that we had no knowledge of pending cancellation. This Office as late as September 19 had received no official information on the cancellation of this lease.

With reference to the question of renewal or extension, on August 18, 1950, Mr. Mahoney was advised generally that the Department of Army is not required to renew leases with tenants; however, at that time, if tenants were considered good tenants by all concerned upon proper recommendation, the Secretary of Army on some occasions had authorized renewal by negotiation.

The answers to questions asked are as follows:

1. The lease was awarded to Jack Colberg, William F. Cook, and Edward J. Mahoney, Jr., by public bid, invitation No. ENG04-203(s)-50-21, which was opened in this office. These premises were offered to Commodity Credit Corpo-

ration and were determined available for outleasing by G-4, Department of Army, at Washington, D. C. These warehouses were not excess to the Department of Army requirements, only available for lease.

2. The term was for a full year subject to the termination-at-will clause. Determinations of availability to lease are intended to be made by Department of Army policy so that property will be available for use without interference with current or potential Army requirements, and commitments will be on a sufficiently firm basis on which the prospective lessee may reasonably rely. Further, it is intended that determination of availability will not be impaired or withdrawn except for military needs not foreseeable at the time the lease is granted. It is my understanding that it is intended that usually the "termination-at-will" clause will be exercised only when military needs were not foreseeable at the time the lease is entered into.

3. The tenants were acceptable to the Government as high bidders.

4. By personal recollection I can recall having walked through one warehouse in October 1950, and it appeared well-filled.

5. The delegation on the behalf of the Secretary of Army of authority to make press releases in this matter is not a matter of official knowledge in this Office.

6. On authorized procedures the initiation for the action would commence with installation commander through appropriate channels to the departmental level in Washington. The action was not initiated by or through this Office.

7. I cannot advise you of the answer to this question.

8. I did not contact Washington personally pertaining to this lease. Colonel Tandy may have. (He is now employed by Campbell Construction Co. of this city.) Mr. Rogers of Richmond Chase was either in or called this Office, I believe about August 18, 1950, and Mr. Courtney of CCC contacted this Office on September 14 and September 19. I believe these people were customers of Maco.

There is no information which I can furnish not contained in the above questions, except that the policies stated above in answer to question 2 are a matter of public record, as they are contained in Army regulations.

Very truly yours,

R. U. DOWNIE.

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